FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

No. 76-302

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM EMANUEL ALLEN and DANIEL LEE GOINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-302

WILLIAM EMANUEL ALLEN and DANIEL LEE GOINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of affirmance of the court of appeals (Pet. App. D) is reported at 538 F. 2d 320. The memoranda of the district court denying the motion to suppress (Pet. App. A), adjudging petitioners guilty (Pet. App. B), and denying motions for a new trial (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976, and a petition for rehearing (Pet. App. E) was denied on July 28, 1976. The petition for a writ of certiorari was filed on August 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of petitioners was incident to a lawful arrest.

2. Whether the evidence was sufficient to support the convictions.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of breaking seals on vehicles carrying interstate shipments, with intent to commit larceny, in violation of 18 U.S.C. 2117. Each was sentenced to three years' imprisonment. The court of appeals affirmed without opinion (Pet. App. D).

The evidence at trial showed that on April 26, 1975, trailers containing interstate shipments were parked at the IML Freight Terminal at Neville Island, Pennsylvania (Tr. 12). At about 9:00 p.m. on that day, a security guard at a nearby freight terminal observed petitioners walking between and under the trailers in the IML terminal (Tr. 87). The security guard became suspicious and notified the local police (Tr. 87-88).

Two police officers arrived at about 9:30 p.m. (Tr. 99). One officer checked the IML front gate, found it locked,[1] and began walking around the fence surrounding the terminal yard. As he did so, petitioners ran from the terminal building toward a shanty (Tr. 100) and then attempted to flee the terminal grounds (Tr. 100-101, 137-138). Petitioners were eventually overtaken, subdued, and arrested by the officers (Tr. 101-102, 138). A search of petitioners uncovered wire cutters or pliers in petitioner Allen's pocket (Tr. 103, 139).[2]

---

[1]Other gates to the facility were also locked (Tr. 46).

[2]Petitioners were each wearing gloves when they were arrested (Tr. 103, 139, 142). Although the gloves were seized and introduced at trial (Tr. 139, 142), the district court found them to be "of only slight evidentiary value since the night was chilly" (Pet. App. 9a).

The freight yard was also searched shortly after petitioners' arrest (Tr. 21, 144; Pet. App. 6a). Although the seals on three of the trailers had been inspected and found intact earlier in the day, and a fourth sealed trailer had arrived from Cincinnati, Ohio, late that afternoon (Tr. 32-34), the seals on all four trailers containing interstate shipments were found pried open at approximately 10:00 p.m. (Tr. 21, 66). Furthermore, doors on the trailers had been opened and some of the freight had been removed and placed on the ground (Tr. 20-21, 147; Pet. App. 6a).

ARGUMENT

1. Petitioners contend (Pet. 4) that they were arrested without probable cause and that the searches incident to their arrests were therefore illegal. This claim is insubstantial. Petitioners were observed at night in a locked freight yard under suspicious conditions. When the officers approached, petitioners first attempted to conceal themselves and then tried to escape. While fleeing, they ignored both an order to halt and a warning shot (Tr. 138). See *Sibron* v. *New York*, 392 U.S. 40, 66.[3] In these circumstances, the officers had probable cause to believe that petitioners were engaged in criminal activity. See *United States ex rel. Frasier* v. *Henderson*, 464 F. 2d 260, 262-263 (C.A. 2); *United States ex rel. Richardson* v. *Rundle*, 461 F. 2d 860, 863-864 (C.A. 3), certiorari denied, 410 U.S. 911; *Hinton* v. *United States*, 424 F. 2d 876, 879-880 (C.A. D.C.).[4] Accordingly, the searches made incident to these arrests were legal. *United States* v. *Robinson*, 414 U.S. 218, 224.

---

[3]*Wong Sun* v. *United States*, 371 U.S. 471, cited by petitioners, held that, in the circumstances of that case, a defendant's flight did not signify guilty knowledge because it may have resulted from "a natural desire to repel an apparently unauthorized intrusion" (*id.* at 483). No comparable explanation for petitioners' flight is present here.

[4]Contrary to petitioners' suggestion (Pet. 4), knowledge of the precise crime in which a suspect is engaged is not required in order to justify an arrest. *United States ex rel. Frasier* v. *Henderson*, *supra*.

2. Petitioners claim (Pet. 4-5) that the evidence was insufficient to support their convictions. Viewed in the light most favorable to the government, however, the evidence outlined above unquestionably justified the trial court's findings. Moreover, the court properly considered petitioners' concealment and flight as evidence of consciousness of guilt. Petitioners' actions, which were triggered by the arrival of police officers, were highly probative, especially since petitioners had fled in the face of an order to halt and a warning shot.[5]

United States v. *Tavoularis*, 515 F. 2d 1070 (C.A. 2), does not support petitioners' arguments. There, although the defendants had been convicted of possession of Treasury bills, knowing them to have been stolen from a bank, the evidence showed only that the defendants had possessed the bills with knowledge that they had been stolen. The court of appeals reversed the convictions on the ground that the evidence did not support the inference that the defendants knew the property had been stolen from a bank, proof of which was required by statute. By

[5] *Bailey* v. *United States*, 416 F. 2d 1110 (C.A. D.C.), is distinguishable. Although the evidence in that case showed that the defendant was present at the scene of a robbery, that he had a slight association with the robber, and that he had fled after the robbery, the proof was insufficient to show that defendant had associated himself with or promoted the robbery. By contrast, petitioners' concealment and flight, coupled with their presence at the trailers where the seals were broken and their possession of tools suitable for breaking the seals, indicated that they had broken the seals. Unlike *Bailey*, petitioners' actions here, apart from their flight, were not innocuous.

Similarly, *United States* v. *Thomas*, 453 F. 2d 141 (C.A. 9), certiorari denied *sub nom. Lucas* v. *United States*, 405 U.S. 1069, is inapposite. In *Thomas*, the court held that the mere presence of marihuana in an automobile was insufficient to establish the guilt of a passenger for transporting the contraband. The facts here show substantially more than mere presence at the scene of the crime.

contrast, petitioners were shown to have been at the scene of the crime, to have possessed a tool useful in breaking into sealed trailers, and to have attempted concealment and flight upon the appearance of police officers. Moreover, the seals, which had been intact before petitioners' arrival at the yard, were found broken after their arrests. The compelling inference is that petitioners broke the seals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
JAMES A. HUNOLT,
Attorneys.

NOVEMBER 1976.

DOJ-1976-11